No. 03-385

IN THE

Supreme Court of the United States

STANLEY J. GAUDET, *et ux.*,

Petitioners,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SHEET METAL WORKERS' NATIONAL PENSION FUND AND NEW ORLEANS SHEET METAL WORKERS LOCAL UNION NO. 11 PENSION FUND

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QUESTION PRESENTED

Whether, based on the undisputed facts in the record, Respondent Sheet Metal Workers' National Pension Fund ("NPF") was entitled to judgment in its favor, dismissing the claims against it by Petitioners Stanley J. Gaudet ("Stanley Gaudet") and Audrey Chaix Gaudet ("Audrey Gaudet") (collectively, the "Gaudets" or "Petitioners"), because, as a matter of law, no benefits are due and owing from the NPF to Stanley Gaudet, and, therefore, Audrey Gaudet is not entitled to any benefits from the NPF under an alleged "qualified domestic relations order," as such term is defined in 29 U.S.C. § 1056(d)(3)(B)(i), which purported to assign one-half of any benefits due and owing to Stanley Gaudet from the NPF.

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Reorganization Plan No. 4 of 1978, reprinted in 1978 U.S.C.C.A.N. 9814 17

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The opinion of the district court (Pet. App. 22-42) is reported at 216 F. Supp. 2d 582. An earlier of opinion of the district court (Pet. App. 4-21) is unreported.

STATUTORY AND REGULATORY PROVISIONS

The following additional statutory and regulatory provisions are involved in this case:

1. 29 U.S.C. § 1056(d)(1), which provides:

> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

2. 26 C.F.R. § 1.401(a)-13(c)(2)(iii), which provides, in relevant part:

> (2) Specific arrangements not considered an assignment or alienation. The terms "assignment" and "alienation" do not include . . . the following arrangements:
>
> (iii) Any arrangement for the recovery by the plan of overpayments of benefits previously made to a participant.

3. 29 U.S.C. § 1056(d)(3)(B), which provides, in relevant part:

> (B) For purposes of this paragraph —
>
> (i) the term "qualified domestic relations order" means a domestic relation order —
>
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
>
> (II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
>
> (ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which —
>
> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
>
> (II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies —

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order —

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

> (iii) does not require the payment of benefits to an alternate payee, which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

4. 29 U.S.C. § 1104(a)(1)(D), which provides, in relevant part:

> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

STATEMENT OF THE CASE

Respondent NPF is a defined benefit, multiemployer employee pension benefit plan governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). R. 472. The NPF is administered by a joint board of trustees ("Trustees"), which has the sole discretion to interpret the plan document and determine any person's entitlement to benefits under the NPF. R. 472-473, 558.

Respondent New Orleans Sheet Metal Workers Local Union No. 11 Pension Fund ("Local 11 Pension Fund") was a defined benefit, mutliemployer employee pension benefit plan that merged into the NPF in or about 1993.[1] R. 473. Consequently, the NPF acquired all the assets, and succeeded to the rights and liabilities, of the Local 11 Pension Fund. *Id.* Before the Local 11 Pension Fund merged into the NPF, it was administered by a joint board of trustees, which had the sole discretion to interpret the plan document and determine any person's entitlement to benefits under the plan. R. 61, 473. Stanley Gaudet participated in both the Local 11 Pension Fund and the NPF, before the two plans merged. R. 473. He also served as a labor trustee of the Local 11 Pension Fund from 1974 until 1989. *See Mazur, et al. v. Gaudet, et al.*, 826 F. Supp. 188, 189 (E.D. La. 1992). While the Local 11 Pension Fund had other trustees, Stanley Gaudet essentially exercised complete control over the Local 11 Pension Fund's assets. *See id.* at 190-191.

By using an elaborate conversion scheme, Stanley Gaudet used his powers as a trustee of the Local 11 Pension Fund to distribute plan assets to himself on numerous occasions between 1983 and 1989.[2] *See United States v. Gaudet*, 966

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1. As the context requires, any reference to the NPF refers jointly to the NPF and the Local 11 Pension Fund.

2. Stanley Gaudet pled guilty in 1989 to embezzling $2,593,903.37 from the Local 11 Pension Fund and a Local 11 employee welfare benefit plan (the "Local 11 Welfare Fund") (collectively, the "Local 11 Funds"). *See Mazur*, 826 F. Supp. at 189. Additionally, in April of 1991, Stanley Gaudet pled guilty to federal charges of theft and embezzlement. *Id.* As a result of his guilty plea, the United States District Court for the Eastern District of Louisiana:

(Cont'd)

F.2d 959, 961 (5th Cir. 1992). As part of his conversion scheme, Stanley Gaudet made withdrawals from, among other things, the Local 11 Pension Fund's checking accounts or its EF Hutton investment accounts. *See Mazur*, 826 F. Supp. at 189. Instead of purchasing Certificates of Deposit ("CD") for the Local 11 Pension Fund, he would take the proceeds to a bank and obtain a certified check with which he would either purchase a CD for himself or deposit the check into a bank account that he maintained for himself. *Id.* He would then draft false safekeeping receipts to give to the Local 11 Pension Fund's administrator as a record of investments he supposedly made on behalf of the Local 11 Pension Fund.[3] *See id.*

In order to recover the losses resulting from Stanley Gaudet's unauthorized and premature distribution of plan assets to himself, a civil action under ERISA was commenced in the United States District Court for the Eastern District of Louisiana against, among others, Stanley Gaudet. The case, which was captioned *Mazur v. Gaudet, et al.*, Civil Action No. 89-2723, resulted in a judgment of $18,028,924 (plus interest and attorney's fees) against Stanley Gaudet. R. 598.

(Cont'd)

(i) sentenced Stanley Gaudet to an aggregate term of 221 months in prison; (ii) ordered him to make restitution in the amount of $2,750,538.87; and (iii) further ordered Stanley Gaudet to relinquish the pension funds to which he was personally entitled, in order to satisfy the restitution amount. *Gaudet*, 966 F.2d at 961.

3. Stanley Gaudet also employed the same scheme to embezzle assets of the Local 11 Welfare Fund, while also acting as a trustee of that plan.

The evidence submitted in the *Mazur* case shows that the actual amount of Local 11 Pension Fund assets that Stanley Gaudet distributed to himself was $4,308,524.[4] R. 600-616. Taking into account the interest that would have accrued on those distributions, the total value of those funds, as of September 30, 1993, was $16,023,198 (based on 52-week U.S. Treasury compound interest through September 30, 1993). R. 604-614. This amount represented the value, as of September 30, 1993, of the benefit Stanley Gaudet derived from the unauthorized distributions he made to himself (as well as the corresponding loss to the NPF, as the Local 11 Pension Fund's successor in interest).

In contrast, Stanley Gaudet's accrued benefit under the NPF (including the portion accrued under the Local 11 Pension Fund prior to its merger) had a present value of only $292,000 (determined as if such benefit had commenced as of March 1, 1991). R. 646. Thus, the amount of NPF assets that Stanley Gaudet distributed to himself far exceeded his entire accrued benefit under the NPF (including the pre-merger portion accrued under the Local 11 Pension Fund).

Notwithstanding the fact that Stanley Gaudet already had distributed to himself amounts far in excess of his accrued benefit, he applied for a pension from the Local 11 Pension Fund in 1991 (before its merger into the NPF). R. 642. The records of the Local 11 Pension Fund reflect that the plan's then board of trustees denied Stanley Gaudet's pension application, having determined that it would be a breach of fiduciary duty to pay him the requested pension benefit. *Id.*

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4. This exceeds the amount to which he pled guilty to embezzling in the criminal action ($2,593,903.37), and also exceeds that amount of restitution that Stanley Gaudet was ordered to make under his criminal sentence ($2,750,538.87).

Stanley Gaudet sought reconsideration of the benefit denial, but the Local 11 Pension Fund's board of trustees denied his request on or about August 30, 1991. R. 645.

On or about September 3, 1992, Ms. Marsha Gochnauer, then an employee of the NPF, forwarded to then NPF counsel Raymond Sweeney a signature form, retirement declaration form, and a benefit election form for the NPF, each of which was required to be submitted to the NPF prior to the issuance of payment. R. 634. Ms. Gochnauer included with those forms a letter addressed to Stanley Gaudet, which explained that he needed to complete and sign the enclosed forms in order to be eligible for benefits. *Id.* It was Ms. Gochnauer's understanding that former counsel Sweeney then forwarded those forms to Stanley Gaudet. *Id.* Because Stanley Gaudet failed to return the completed forms to the NPF, Ms. Gochnauer forwarded a second set of forms in 1993 by cover letter directly to Stanley Gaudet and requested that such forms be returned within 30 days. R. 634, 640.

The NPF requires an election of pension form, a signature form, and a signed retirement declaration form before issuing payment. R. 634. Nothing was received in reply to Ms. Gochnauer's letter and the NPF closed Stanley Gaudet's file. *Id.* It was Ms. Gochnauer's understanding, at all relevant times, that any benefits that the NPF would have paid to Stanley Gaudet would have been placed in escrow and returned to the NPF as restitution, pursuant to Stanley Gaudet's criminal sentence.

On or about May 17, 2001, Stanley Gaudet and Audrey Gaudet apparently obtained a Judgment of Separation of Property from the 25th Judicial District Court for the Parish of St. Charles, State of Louisiana (hereinafter, the "State

Court Order"). R. 267-268. The State Court Order purported to declare that, among other things: (i) Audrey Gaudet is to be entitled to one-half of all pension benefit payments due and payable to Stanley Gaudet by the NPF, from March 1, 1991 to the date of the signing of the judgment; and (ii) subsequent to the entry of judgment, Audrey Gaudet will be entitled to receive one-half of all pension benefits due and owing to Stanley Gaudet until the time of his death. *Id.* The NPF was not provided with notice of the state court proceedings until after the State Court Order had been entered and the Petitioners had filed an amended complaint in the instant action. R. 474.

The NPF determined that the State Court Order was not a "qualified domestic relations order" ("QDRO") within the meaning of 29 U.S.C. § 1056(d)(3)(B)(i) and notified the Gaudets' counsel of that determination on or about September 26, 2001. R. 625-626. Significantly, the NPF also noted that there was nothing due and owing to Stanley Gaudet from the NPF. R. 626. Although the Gaudets did not appeal the NPF's determination, the NPF did not press its affirmative defense that the Gaudets failed to exhaust their administrative remedies regarding the QDRO, because requiring an appeal on that issue would not have furthered the purposes of the exhaustion requirement.

The Gaudets filed a Motion for Partial Summary Judgment seeking, *inter alia*, a declaration that Audrey Gaudet was entitled to benefits from the NPF as an alternate payee under an alleged QDRO, which purported to assign to Audrey Gaudet one-half of the pension benefits due and owning to Stanley Gaudet. *See* Pet. App. 27. The NPF contended that the issues relating to the QDRO were moot, since no benefits were due and owing to Stanley Gaudet because he had already received a distribution of plan assets in excess of his accrued benefit. *See id.*

The district court advised the Gaudets that it intended to deny their motion and render summary judgment, *sua sponte*, in favor of the NPF, and the Gaudets were afforded ten (10) days to present any new arguments explaining why summary judgment should not be rendered against them. Pet. App. 21. After additional briefing by the parties, the district court entered a final judgment on March 13, 2002, which, among other things, rendered summary judgment, *sua sponte*, in favor of the NPF and dismissed the Petitioners' claims. Pet. App. 42-43. The Gaudets appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit.

Although the Gaudets argued that the district court's judgment constituted an illegal offset in violation of ERISA's anti-alienation provision, the court of appeals astutely treated the case as a denial of benefits case and thus reviewed the plan administrator's denial of benefits under the abuse of discretion standard applied by the Fifth Circuit in *Spacek v. The Maritime Assoc., I.L.A. Pension Plan*, 134 F.3d 283, 288 (5th Cir. 1988). Pet. App. 2.

The court of appeals below concluded that, in light of the large amounts Stanley Gaudet distributed to himself for his personal benefit, the plan administrator did not abuse its discretion when it denied the Gaudets' claims, based on the terms of the plan that preclude duplicate pensions. Pet. App. 3. The Gaudets failed to file timely a motion for rehearing *en banc* but did file a Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

The Petitioners do not present any compelling reasons for this Court to exercise its discretion to grant their Petition for Writ of Certiorari. There is no conflict between the court of appeals' decision below and any other United States court of appeals' decision on the same matter. The court of appeals' decision below does not depart from the accepted and usual course of judicial proceedings. Indeed, both the decisions of the court of appeals and the district court below were legally correct and well reasoned. Accordingly, the Petition for Writ of Certiorari should be denied.

I. This Case Does Not Involve A Retroactive Application Of 29 U.S.C. § 1056(d)(4)

The Petitioners contend that the plan administrator's interpretation of the relevant plan provision constituted "an improperly retroactive application" of a statutory amendment, and that the court of appeals erred by applying an abuse of discretion standard to the plan administrator's interpretation. Pet. 7. This is patently incorrect.

The statutory amendment to which Petitioners refer is 29 U.S.C. § 1056(d)(4), which was added to ERISA in 1997 and provides an exception to the rule that prohibits the assignment or alienation of pension benefits. Specifically, Congress created an exception for an offset of a participant's pension benefit against any amount that the participant is ordered or required to pay to the plan pursuant to a court order, judgment or decree, or a settlement agreement (to which the Secretary of Labor ("DOL") or Pension Benefit Guarantee Corporation ("PBGC") is a party), because of the participant's violation of ERISA or criminal violation

involving the plan. *See* 29 U.S.C. § 1056(d)(4). However, the offset is not established by the terms of a plan. Rather, the offset must be expressly provided for in the order, judgment, decree, or settlement agreement. *See* 29 U.S.C. § 1056(d)(4)(B). Moreover, the exception does not create a new cause of action or remedy under ERISA. It merely clarifies that a plan provision prohibiting an assignment or alienation of pension benefit (as required by 29 U.S.C. § 1056(d)(1)) does not apply to an offset ordered by the court or required by a settlement agreement with the DOL or PBGC. Accordingly, there is no foundation to the Petitioners' argument that the interpretation by the NPF's plan administrator involved a retroactive application of 29 U.S.C. § 1056(d)(4).

To the contrary, as the court of appeals below pointed out, the NPF determined that no benefits were due and owing to Stanley Gaudet because he had already received a distribution of plan assets that exceeded the amount he was entitled to receive as a pension from the NPF. Pet. App. 3. This is a factual determination borne out by the record. Pet. App. 3. As the district court noted in its opinion, it is inaccurate for the Petitioners to characterize the NPF's denial of benefits as an "offset," since this implies that the NPF owes an obligation to Stanley Gaudet. Pet. App. 37. No such obligation exists because Stanley Gaudet took a premature distribution of his accrued benefit by making periodic distributions of plan assets to himself over a period of several years. *See* Pet. App. 37. The amount Stanley Gaudet distributed to himself far exceeded his accrued benefit. R. 604-614, 646.

Because there was no benefit due and owning to Stanley Gaudet, the NPF's denial of Petitioners' claims does not

involve an assignment or alienation of Stanley Gaudet's pension benefit. One cannot assign or alienate something that does not exist in the first instance. As further explicated below, the NPF's determination and the court of appeals' conclusion were based on the fact that Stanley Gaudet distributed to himself, albeit illegally, plan assets well in excess of his accrued benefit. It was not based on a retroactive application of 29 U.S.C. § 1056(d)(4). Stanley Gaudet already received more than he was entitled to receive from the NPF. The mere fact that the premature distribution constituted a breach of fiduciary duty and embezzlement does not alter the factual conclusion that Stanley Gaudet already received more than the full value of his accrued benefit from the NPF. Accordingly, the NPF's determination that no benefits are due and owing to Stanley Gaudet is not based upon, and does not implicate, 29 U.S.C. § 1056(d)(4), because there is no assignment or alienation of Stanley Gaudet's pension benefit by the NPF.

II. The Court Of Appeals Applied The Proper Standard Of Review And Reached The Correct Result

A. The Plan Administrator's Conclusion was Based on a Fair and Reasonable Interpretation of the NPF's Plan Document

Under 29 U.S.C. § 1104(a)(1)(D), the NPF's Trustees must discharge their fiduciary duties regarding the payment of benefits in accordance with the terms of the NPF's plan document. The relevant terms in this case are contained in Section 5.12 of the NPF's plan document, which provides:

> A person shall be entitled to only one pension under this Plan, except that a Pensioner receiving

> a Disability Pension or an Industry-Related Disability Pension who recovers may be entitled to a different type of pension.

R. 535.[5]

A fair and reasonable reading of Section 5.12 is that it precludes a participant from receiving more than his accrued benefit under the plan (i.e., the amount he is entitled to receive as a pension). Because Stanley Gaudet already received distributions of NPF plan assets well in excess of his accrued benefit, it is reasonable for the plan administrator to construe Section 5.12 as precluding any further payment of benefits to Stanley Gaudet. To construe Section 5.12 otherwise would defy common sense and would be tantamount to providing a second pension to Stanley Gaudet, as the district court observed. *See* Pet. App. 39.

The mere fact that Stanley Gaudet distributed the plan assets to himself prematurely does not detract from the fact that Stanley Gaudet has already received distributions in excess of his accrued benefit under the NPF. Indeed, because of the time value of money, the premature nature of the distribution magnifies the value of the benefit Stanley Gaudet already received from the NPF. Thus, an application of Section 5.12 to the undisputed facts in the record ineluctably

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5. A non-duplication of pension provision also existed in Section 6.09 of the pre-merger plan document for the Local 11 Pension Fund:

> Nothing contained in this Plan shall be construed as permitting any person to be entitled simultaneously to more than one type of pension from the Pension Fund.

R. 45.

points to the conclusion that Stanley Gaudet has already received all of the benefits to which he is entitled under the NPF. The anti-alienation provision of ERISA is inapplicable, since there is no benefit left to assign or alienate.

B. The Plan Administrator Did Not Engage in Statutory Interpretation

The Petitioners are in error when they assert that the NPF's plan administrator was engaging in statutory interpretation as opposed to plan interpretation. *See* Pet. 7-10. The plan provision in question, Section 5.12, does not bear any relationship to 29 U.S.C. § 1056(d)(4), and does not have the effect of alienating any participant's pension benefit. Rather, Section 5.12 applies to prevent a participant from receiving *more* than he or she is entitled to receive under the terms of the plan, not less.

The Petitioners incorrectly state that they were seeking a determination that the offsetting of Stanley Gaudet's pension violates the anti-alienation rules of ERISA. *See* Pet. 8. The Petitioners' suit sought to require the NPF to pay benefits allegedly owed under the plan and sought damages for, among other things, past due benefits and future benefits. *See* Pet. App. 8. The NPF lodged a counterclaim seeking, *inter alia*, a declaration that the NPF could recover the overpayments of benefits received by Stanley Gaudet by offsetting pension benefits that otherwise would be payable.[6] *See* Pet. App. 8-9.

The Petitioners' Motion for Partial Summary Judgment sought a declaration that Audrey Gaudet is entitled to benefits

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6. The NPF's counterclaim was subsequently dismissed without prejudice.

from, among others, the NPF as an alternate payee under an alleged QDRO. *See* Pet. App. 9. Petitioners did not seek a declaration that any of the plan's provisions violated the anti-alienation provisions of ERISA.

In response to the Petitioners' Motion for Partial Summary Judgment, the NPF asserted that even if Audrey Gaudet were assigned one-half of Stanley Gaudet's interest under a valid QDRO, Stanley Gaudet had no benefits to assign, because he already received more than he was entitled to receive under the terms of the plan document. *See* Pet. App. 10. Thus, the plan administrator was not engaging in statutory interpretation when it denied any further benefits to, or on behalf of, Stanley Gaudet, but rather was exercising its discretionary plan interpretation function.[7] Accordingly, the court of appeals properly utilized the abuse of discretion standard of review. *See Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 111(1989) ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers."). In sum, the plan administrator's determination was legally correct and substantially supported by the evidence, and, as the court of appeals noted, the Gaudets failed to demonstrated that the plan administrator abused its discretion. *See* Pet. App. 3.

7. The cases cited by Petitioners, *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999) and *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), are inapposite. Both of those cases involved the application of the *de novo* standard of review to questions of law that were being considered by the plan administrator, rather than questions of plan interpretation. In *Smith v. Sydnor*, the court addressed the question of deference where the claims involved alleged violations of specific ERISA provisions, rather than plan interpretation or factual determinations. 184 F.3d at 365. Likewise, in *Penn v. Howe-Baker Engineers, Inc.*, the *de novo* standard of review was applied to the determination of an individual's status as an employee or independent contractor. 898 F.2d at 1101.

III. The NPF's Position Is Also Supported By The Applicable Regulations

Because the premature distributions that Stanley Gaudet made to himself constituted criminal acts of embezzlement and violations of ERISA, the Petitioners erroneously assume that the NPF must rely on the exception in 29 U.S.C. § 1056(d)(4) in order to recoup those distributions.[8] However, the upshot of these unauthorized distributions is that Stanley Gaudet received benefits to which he was not entitled under the terms of the plan, meaning that he received an overpayment of benefits, both in terms of the dollar amounts distributed and the time value of those monies. The Petitioners overlook that an arrangement to recover an overpayment of benefits, such as withholding future payment that otherwise would be payable, is not treated as an alienation or assignment under the applicable regulation promulgated by the Secretary of Treasury.[9] Thus, it is not necessary to rely upon the exception to the anti-alienation rule in 29 U.S.C. § 1056(d)(4), in order to recoup the overpayments Stanley Gaudet made to himself.

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8. The point that the Petitioners fail to grasp is that 29 U.S.C. § 1056(d)(4) is not invoked if the plan addresses the unauthorized distribution in a manner that does not result in an assignment or alienation in the first place.

9. That regulation, 26 C.F.R. § 1.401(a)-13, was promulgated by the Secretary of Treasury, pursuant to Reorganization Plan No. 4 of 1978 ("Reorganization Plan No. 4"), reprinted in 1978 U.S.C.C.A.N. 9814, 9815. Reorganization Plan No. 4 transferred the authority to promulgate regulations implementing 29 U.S.C. § 1056(d) from the Secretary of Labor to the Secretary of Treasury. In *Guidry v. Sheet Metal Workers' National Pension Fund*, 493 U.S. 365, 371-72 (1990), this Court recognized that 26 C.F.R. § 1.401(a)-13 is the administrative regulation that implements 29 U.S.C. § 1056(d). *See Robbins v. De Buono*, 218 F.3d 197, 203-04 n.3 (2d Cir. 2000).

Under 26 C.F.R. § 1.401(a)-13(c)(2)(iii), the terms "assignment" and "alienation" do not include "any arrangement for the recovery by the plan of overpayments of benefits previously made to a participant." Based on the facts and circumstances contained in the record, the withholding of the pension benefits that otherwise would have been payable to Stanley Gaudet clearly constitutes a proper arrangement for the recovery of the overpayments he received by making unauthorized distributions of plan assets to himself while acting as a trustee of the NPF's predecessor plan. Accordingly, there is an additional basis to support the conclusions of the district court and court of appeals below.

CONCLUSION

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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